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**University of Bath**

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## **Lost in the Process? The impact of devolution on abortion law in the United Kingdom**

When it comes to accessing abortion in the United Kingdom, the situation is anything but united. A woman in England can access abortion services up to 24 weeks. A woman in Northern Ireland cannot receive a taxpayer funded abortion in her local hospital but can if she travels to England or Scotland (or eventually, it is promised, to Wales). A woman in Scotland having an early medical abortion can take the second part of her medication at home, not at a medical facility; although England and Wales have now followed suit. A woman in Wales will be subject to legislation made in Cardiff for all other aspects of her medical treatment, but not abortion where policy remains in line with England.

Abortion is an emotive subject that has led to polarised debate in nations such as the United States of America; however, despite increasing divergences across the United Kingdom (UK), contemporary debates around abortion access are rarely politicised. Moreover, as this article demonstrates, when they have been, the subject has been framed by politicians as a *constitutional* matter, relating to legislative competencies, rather than considered in terms of women's rights. This framing, we argue, is linked to the specific constitutional arrangements of the post-devolution UK and the political strategies of the parties operating within them.

Feminist analyses have generally viewed decentralised systems of governance as positive. They argue that such systems create new opportunities for women, particularly in relation to descriptive representation, but also in the shape of new 'venues' wherein policy change can be affected. By focusing upon the example of abortion policy in the UK, this paper challenges this perspective. While post-devolution decentralisation has created space for differentiation, we argue here that far from a 'race to the top' (Mackay, 2010) in policy terms, an analysis of divergences demonstrate they have occurred on an ad hoc basis, as reactions to specific pressures on politicians engendered by multi-level system of governance themselves.

Subsequently, being born not from considered policy making and/or an agreed party line, political parties, legislatures and executives have demonstrated little institutional ownership over the policies they themselves have enacted; instead, the devolved system encourages a depoliticising language of national distinction and legislative competencies to explain policy differences, rather than justifications based upon consistent, universalist positions on the issue of women's rights. In contrast to the positivity evident within some of the feminist literature, the UK's devolved system therefore demonstrates the risks that come with legislative decentralisation, not only with regards to increased incoherence across the nations, but also risks of backsliding (Amery, 2013; 2015). As a decentralised political system it is unsurprising that variations in abortion policy exist across the UK, however what this paper demonstrates is how constitutional preferences and party politics have come to overshadow the discussion on women's reproductive rights. With a shift in systems of governance across most OECD states towards increasing regional authority (Hooght, et al., 2008; 2010), these conclusions raise important considerations for feminist scholars and activists around the impact of decentralisation.

This argument is developed in four parts. The first provides a brief overview of the post-devolution UK system of governance. This discussion introduces and defines key terminology, situating the system within the wider literature on multi-level governance and raising the strategic opportunities such systems introduce into political party decision-making, both electorally and governmentally. Having outlined devolution and the concept of multi-level governance in general, the second part introduces feminist institutionalism, the theoretical framework guiding this research analysis, placing specific emphasis upon the gendered impact of decentralised systems of governance.

The paper then moves onto the specific situation with regards to abortion politics in the UK, starting with the introduction of the 1967 Abortion Act and tracing the different trajectories taken across the post-devolution UK. In doing so, it adopts a nation-by-nation approach, outlining and identifying differences between abortion policies in England, Scotland, Northern Ireland and Wales. The article concludes with a broader discussion of the dynamics shaping abortion policy and services across the devolved UK.

### **The Post-Devolution Multi-Level UK State**

Since 1999, the post-devolution United Kingdom of Great Britain and Northern Ireland has been home to four legislatures. The first of these, the Westminster Parliament in London, is the state (UK) legislature. The three others are the devolved legislatures, representing three of the four sub-state nations that collectively constitute the Union: the Scottish Parliament, in Edinburgh; the National Assembly for Wales, in Cardiff; and the Northern Ireland Assembly, in Belfast. These sub-state legislatures have been devolved a series of legislative powers previously held by the state legislature, although, as guidance produced by the UK Government emphasizes, the latter ‘remains sovereign, and retains the power to amend the devolution Acts or to legislate on anything that has been devolved’ (HM Gov, 2013). Westminster has utilised two models of devolution. The first of these, the reserved powers model, defines in law what a devolved body *cannot do*, by *reserving* specific powers at Westminster. In contrast, the second, the conferred powers model, defines in law what a devolved institution *can do*, by *conferring* specific powers onto the body (Moon and Evans, 2017: 336-338).

From their creation, each of these sub-state legislatures have had differing powers and responsibilities devolved to them; for example, while all three bodies have held competency over health care since their inception, there are differences in legislative competence surrounding policing and tax-raising powers. Such irregularity, alongside the lack of a written

constitution that guarantees the sub-state legislatures' powers and existence, differentiates the UK from federal systems such as the Federal Republic of Germany and the United States of America. Lacking simple categorisation, academics have sought a means by which to conceptualise the post-devolution UK. Some scholars have settled on the term quasi-federalism (Bogdanor, 2005: 85), others prefer the concept of multi-level governance (MLG), the latter describing 'the dispersion of authoritative decision making across multiple territorial levels' (Bache & Flinders, 2004a: 34), with increasing independence of actors at different levels alongside an increasing interdependence of government and non-government elements.

In shifting towards a multi-levelled political system the UK has followed a trend occurring across most OECD states, one that has seen increasing regional autonomy and a rise in territorially based minority nationalisms (Keating & McGarry, 2001). Such shifts introduce new arenas of electoral competition across different sub-state regional/national polities, necessitating institutional and strategic adaption by state-wide parties as they address different electorates and confront specific threats from territorial based regionalist/nationalist parties (Deschower, 2003: 216-17; Fabre, 2008; 2010; Swenden & Maddens, 2009; Miragiotta & Jackson, 2015: 550). As both states and parties have undertaken processes of decentralisation, academics and activists have sought to understand how these changes in institutional context both open and contain opportunities for political campaigners to affect policy across increasingly multi-levelled polities.

### **Decentralisation and Gender**

Feminist institutionalism 'seeks ... to move the research agenda towards questions about the interplay between gender and operation and effect of political institutions' (Mackay, Kenny & Chappell, 2010: 547), whilst drawing upon the tools of new institutionalism to help address key issues of concern to feminist political scholars. This article builds on a body of feminist work that emphasises that the institutional context in which abortion policy is addressed has

often been under-acknowledged (McGraw, 2018; Thomson, 2019). Abortion tends to be analysed within social movement or policy frameworks that ‘seldom highlight political institutions; instead they take them for granted and treat them as natural occurrences’ (Halfmann, 2011: 5); yet, the shape of political institutional structures frames the way in which they will come to be addressed as issues, meaning that different institutional set-ups can often create very different policies around gendered issues (Htun, 2003; Htun & Weldon, 2018).

The significance of MLG for gender politics, women’s organisations, and social policy development is already recognised within feminist institutionalist (Grace, 2011; Thomson, 2019) and federalist analyses (Haussman, Sawyer & Vickers, 2010). Indeed, MLG systems such as the contemporary post-devolution UK have been lauded by feminist scholars as being useful for women’s rights lobbyists and political parties due to multiple institutions meaning more sites for instituting change (Celis, MacKay & Meier, 2012). The possibility of so-called “venue-shopping” (Vickers, Haussman & Sawyer, 2010: 237) means that women’s activists and political parties can move between different arenas of government to encourage change at the institution they think likely to be most receptive (Chappell, 2002: 97, 152; Vickers, Haussman & Sawyer, 2010: 229). Bashevkin (1998), for example, found that the long period of Conservative rule from 1979-1997 made feminist lobbying at Westminster difficult, with successes only possible largely due to the ability to lobby and involve certain aspects of the European structure.

Whilst changes in state architecture may present new opportunities for more gender aware procedures, cultures and actors, the literature also illustrates challenges. For example, multiple levels of governance may limit centralised efforts to enact or protect women’s rights due to ‘veto players’ using the division of authority to obstruct central reforms at sub-state levels (Haussman 2005). Blurred boundaries or jurisdictional overlaps additionally enables political elites to ‘dodge’ responsibility for gender equality (Vickers 2010, 2011) while some

feminists advocate social welfare functions be assigned to state-level legislative bodies ‘to ensure national standards and uniform social and economic rights and prevent a ‘post code lottery’ (Sawer & Vickers, 2010: 7).

The analysis of abortion policy – and in particular the debates surrounding differentiation in abortion policies – across the post-devolution UK undertaken here highlights the challenges multiple levels of governance can have for gender equality. Coupled with a lack of institutional ownership and the relatively low political salience of abortion, a situation is created wherein abortion has not been addressed proactively by centralised *or* devolved legislative bodies and political parties. Instead, as demonstrated below, this neglect has created a confusing set-up where multiple different legal positions on abortion (including what amounts to an almost outright ban in Northern Ireland) exist across the UK, where change comes in an ad-hoc fashion rather than through any considered party or institutional policy, bringing dangers of eventual backsliding. This down-beat assessment of the current UK situation introduces important questions for feminists around the impact of political decentralisation on the debates, policies and campaign efforts concerning women’s rights.

Having introduced the concepts of devolution, multi-level governance, and explained the adoption of a feminist institutionalist perspective, the following sections turn to the particular case of abortion policy in the post-devolution UK. In doing so, the article adopts a nation-by-nation approach; initially providing a general overview of the different abortion policies and service provisions in the four constituent nations of the Union, it subsequently looks at the debate and the drivers around abortion politics in the devolved nations – Scotland, Northern Ireland and Wales.

### **Abortion Policy and Politics in the UK**



The Abortion Act of 1967 continues to exist in the present day in almost its original state.<sup>i</sup> Yet, as Table 1 illustrates, there are clear legal and policy variations across the devolved legislatures. The 1967 Act was brought into power at a time when a separate Parliament at Stormont existed and was thus not applied to Northern Ireland. Instead, every year around 800-1000 women travel from Northern Ireland to England for terminations.<sup>ii</sup> Previously paid for privately, from June 2017 the Government committed to covering these costs from the Government Equalities Office budget in England, with the Welsh and Scottish governments following suit with similar promises. Within Northern Ireland, however, abortion remains essentially illegal. From 2015 onwards, Northern Ireland is no longer the constitutional anomaly as legislation on abortion policy was devolved to Scotland. For Wales, abortion remains a reserved power under the jurisdiction of Westminster, making the National Assembly for Wales the only devolved national body not to have legislative competence on this issue. The most recent development in abortion policy has been the change to early medical abortion where women (when medically appropriate) are now able to take abortifacient medication at home rather than a medical facility.<sup>iii</sup> This was initially introduced in Scotland in 2017 with England and Wales following suit in 2018. Legislation in Northern Ireland remains unaffected.

**[insert Table 1]**

Abortion has very rarely been a political issue in the contemporary UK, especially compared to the more politicised manner in which it is addressed in the US, Spain and Switzerland (Evans, 2015; Halfmann, 2011). In the US, for example, abortion policy has galvanised party politics to such an extent since the 1970s that the topic is described as a virtual litmus test dividing Republicans and Democrats (McGraw, 2017; Layman, 2001). Whilst the US demonstrates the politicisation of abortion within party politics, other contexts highlight deliberate efforts by parties to manage, or side-step, the issue. For example, the battles over abortion policy in Ireland have been contested through the use of extra-parliamentary

institutions (courts, citizens assemblies or referenda) in efforts by the main political parties to ‘de-politicise’ the issue and avoid internal party disputes (McGraw, 2017).

Within the UK, the relative smallness of the lobbying groups that exist apparently echo a limited salience amongst the electorate, with little sign politicising this issue would be a vote-winner. Indeed, largely as a result of the medicalised status it maintains as a policy issue (Amery, 2013, 2015; Halfmann, 2011), there has been very little party competition during elections over this issue in the UK. When laws around abortion have changed, this has largely been the result of cross-party support or moves by relatively minor political actors. The Private Members’ Bill that brought about the Abortion Act was brought by a back-bench MP, David Steel, from one of the smaller parties (the Liberal Party), receiving cross-party support and implicit support from the Wilson government, which made time for its debate within Parliament. The 2017 amendment to have abortions for NI women paid for by the English NHS was brought about by opposition backbencher, Stella Creasy MP, but received widespread support across all major political parties at Westminster. Ongoing attempts are being made to repeal the parts of the Offences Against the Person Act which relate to abortion and, if successful, will essentially decriminalise the procedure in England, Wales and Northern Ireland. These efforts are being led by Labour MPs (Creasy and Diana Johnson) but there is again strong cross-party consensus shown for this potential change, with front bench Conservatives such as Penny Mordaunt voting in favour in the first reading of the proposed bill in late 2018.<sup>iv</sup>

In line with the feminist institutionalist perspective outlined above, to understand this confusing legal and territorial picture it is important to consider the impact that institutional architecture and party competition plays across different political contexts. In order to map out the circumstances driving the diversity in abortion policy across the devolved UK, this article

draws upon parliamentary debates and interviews with political representatives with the aim of identifying factors influencing the policy differentiation (and continuation) described above.

### ***Scotland and Abortion***

At its inception, there was little public debate around whether abortion should, or should not, be devolved to the Scottish Parliament. Despite the devolution of other controversial issues such as euthanasia, abortion remained reserved at Westminster under the 1998 Scotland Act. For some, the reserved powers over abortion legislation were a constitutional irregularity, a position Liberal Democrat peer, Lord Jeremy Purvis outlines;

My party moved for abortion to be in the Scotland Bill of 1998 and Tony Blair refused and we have always had the view that it should just be...all of the health policy, criminal law and other areas of health should be the responsibility of the Scottish parliament so for us it wasn't an issue (House of Lords, 28 June 2016).

Whilst supporting the reservation of abortion legislation to Westminster at the time, Labour peer Baroness Ramsey acknowledged the arguments to not include these powers in 1998 were difficult to justify, especially as there was no 'logical intellectual justification' for not devolving abortion (House of Lords, 29 June 2016). Lord Purvis went on to acknowledge that the possible justification behind the anomaly of abortion within the devolution settlement were 'others who were more pro-choice felt that because the Catholic Church is so dominant, if you devolve it then they'll restrict it' (House of Lords, 28 June 2016). From this perspective, it was pressure from women's groups concerned about possible restrictions that, with the support of the Labour leadership, ensured legislative competence over abortion remained under Westminster's control.

Events that triggered the eventual devolution of abortion can be traced back to 2014 and the end of the Scottish independence referendum campaign where, in the event of a no vote, the Conservative, Labour and Liberal Democrat party leaders vowed to grant further devolution

to Holyrood. On the day of the referendum result, a commission led by Lord Smith was announced by Prime Minister David Cameron as the body to consider this process. Ten weeks later, the Smith Report was published discussing further financial, welfare and taxation powers to be devolved. Amongst a wide range of recommendations, the Smith Commission addressed abortion as an ‘anomalous health reservation’ (Smith Commission Report, 2014, 20). However, rather than recommending power over abortion legislation be devolved the report suggested establishing a ‘process’ to consider the matter further. As recounted by a member of the Commission, it had been impossible to reach agreement and with concern that the issue could derail the report, this solution was agreed as a means to ‘dodge’ the issue.<sup>v</sup> As such, devolution of abortion was not included in the Scotland Bill.

Despite the recommendation of a future ‘process’ outside of the new legislation, during the House of Commons debate on the Scotland Bill in July 2015 two new clauses were proposed to include abortion within the devolution of new powers. Apprehensive about the support for these amendments by anti-abortion MPs, Scottish women’s organisations released a joint statement raising their concerns ‘that this strategy of hasty devolution is being used in order to argue for regressive measures and in turn, a differential and discriminatory impact on women and girls in Scotland.’<sup>vi</sup> There was no clear change in public opinion around the issue either - in September 2015, support for transferring the responsibility for abortion law to the Scottish Government was 38 per cent, with 54 per cent preferring to maintain the status quo.<sup>vii</sup>

The first amendment to the Scotland Bill by the Conservative MP for Gainsborough, Sir Edward Leigh, addressed the devolution of abortion along with xenotransplantation, embryology and surrogacy. In justifying this amendment Sir Leigh highlighted the importance of the Scottish government having the power to have control over these issues. In an attempt to allay concerns of legislative variations across the UK Sir Leigh made reference to the differences in Northern Irish abortion legislation and the historic discrepancies of Scottish

legislation, citing elopements to Gretna Green as an example of this (HC, 6 July 2015, cols. 75-76). The justifications for this amendment were therefore framed around reducing the power of the centralised government rather than a women's rights issue.

Secondly, Liberal Democrat Southport MP John Pugh, who has voted conservatively on issues such as same sex marriage and abortion in the past, proposed an amendment that would devolve abortion to align with other health matters. In justifying this clause, Pugh pointed to the competence of the Scottish Parliament to have a reasoned debate and 'despite its Calvinist past, is not quite so fundamental in that respect' (HC, 6 July 2015, col. 109). For Pugh, the Scottish Parliament was the most appropriate body to control the devolution of these powers.

In engaging in this debate the SNP were keen to demonstrate their support for the devolution of abortion and highlight the competence of the Scottish Parliament, yet simultaneously distance themselves from the anti-abortion position. MP for Glasgow South, Stewart McDonald stated, 'we are not a nation of social conservatives ... it has been suggested that my hon. Friends in the Scottish National Party and I will be choosing between nationalism and feminism tonight. I find that a false choice' (HC, 6 July 2015, col. 110). Within this debate McDonald connected Scottish nationalism to progressive values, going on to state that 'Progress was never made without taking control' (HC, 6 July 2015, col. 101). In support of these new powers, a connection was also made by the SNP between progressive values and 'Scottishness'. Arguments against the devolution of abortion by Ian Murray, Labour's only Scottish MP at the time, were criticised by the SNP for undermining the competence of the Scottish parliament and a 'negation of democracy' (HC, 6 July 2015, col.101).<sup>viii</sup> Abortion policy thus became entwined with broader attitudes on the constitutional question and the alleged national values of Scotland. The Scotland Bill debate ended with David Mundell, Secretary of State for Scotland, declaring that the amendment was not appropriate at this time,

stating that a process should instead be put in place to consider the devolution of abortion at a future (unspecified) date.

This consideration came four months later when the issue was debated again in Westminster; however, in a significant difference from the previous debate, the Secretary of State now supported the amendment to devolve abortion law to Scotland. Mundell's argument centred upon the tidying up of this constitutional anomaly within the broader devolution framework. Mundell was also keen to outline the intentions of the First Minister of Scotland, who two months beforehand had stated that the Scottish Government had no intentions of altering the current time limits on abortion (First Minister's Questions, 10 September 2015).

The change of position by Mundell was criticised by Labour MPs Yvette Cooper and Ian Murray for not carrying out a proper consultation process, arguing the changes posed a threat to women's right to choose (HC, 9<sup>th</sup> November 2015, col. 149). To this end, Labour warned against the fragmentation of a system that could threaten women's access and be vulnerable to anti-abortion campaigners who, as Yvette Cooper argued, would find it easier to 'divide us, pick us off one by one, and target us differently' (HC, 9<sup>th</sup> November 2015, col. 150). The value of the Union was also emphasised in terms of effective service delivery and protecting women's rights.

The SNP's response to Labour's opposition to the devolution of abortion was to highlight the progressive track record of the Scottish Parliament:

...despite all three main parties in Scotland being led by women and the Scottish Parliament having brought in some of the most progressive legislation on equal marriage in the world, the Labour party still feels that Scotland's people still need male-dominated Westminster to protect women's rights (Deirdre Brock MP, SNP, HC, 9<sup>th</sup> November 2015, col. 137)

Debating for and against the devolution of abortion became a proxy for party positioning on the constitution and defining national values. The SNP drew on the track record of the Scottish

Parliament in terms of same sex marriage and female political representation, whilst attaching this progressive agenda to Scottish identity. Labour on the other hand, articulated a more practical argument against the devolution of abortion, where the breakdown of unified abortion legislation would undermine universal rights and have a negative impact on service delivery. Within the context of the broader constitutional debate, Labour MSP Johann Lamont described her views on these rival positions on the devolution of abortion:

It was a clash of two different kinds of politics, which was a politics of a nationalist, which said by definition bring powers here and we will do good work with it, against the practicalities of living on one island with two different sets of rules on abortion. It doesn't make any sense to me. (Edinburgh, 25 May 2016)

In contrast to the reservations that appeared in 1998 around devolution of abortion to Scotland, the SNP articulated a Scotland united by progressive values. Resultantly, abortion was not debated in its own terms, as a women's rights issue; clouded by constitutional preference and national identity (Thomson, 2017) it became a proxy for Scotland's relationship within the UK.

Nevertheless, following the 2015 decision to devolve abortion, in October 2017 the Scottish government decided to make Scotland the first nation within the UK where changes were made to the administration of medical abortions. This change, which occurred within the framework of the 1967 Act, was positively received by women's campaign groups as well as medical experts,<sup>ix</sup> yet challenged (unsuccessfully) in the Courts by anti-abortion groups<sup>x</sup>.

### ***Northern Ireland and Abortion<sup>xi</sup>***

Northern Ireland was not included in the Abortion Act of 1967. As such, abortion has always been very restricted in the region. The procedure is only legal where there is a permanent or long-term risk to the woman's health, and remains illegal even in cases of rape, incest or fatal foetal abnormality. The discrepancy regarding Northern Irish abortion law was never addressed by Westminster in the long periods of direct rule from 1972 to 1998 and from 2002 to 2007.

Although the issue was raised in House of Commons debates at the time of devolution in the late 1990s (Thomson, 2015), abortion law was not to be changed.

An attempt was made to extend the act again by various Labour MPs (most notably Diane Abbott) in 2008, when the Human Fertilisation and Embryology Bill was passing through the Commons. The proposed amendment was quietly dropped from proceedings, however, with the widely held assumption being that this was done as part of a trade-off between Labour and the Democratic Unionist Party (who are strongly socially conservative and oppose abortion), in return for the DUP supporting the proposed extended detention limit for terror suspects then also moving through the Commons. Following this, in 2010 further powers regarding policing and justice were devolved to the region, so that responsibility for abortion law now rests with the Northern Irish Assembly.<sup>xii</sup>

Since 2008, the issue of abortion in Northern Ireland received little interest within the state legislature, yet circumstances in 2017 brought it to Westminster's attention. The General Election of June 2017 unexpectedly returned a Conservative minority government, and not the continuing majority many anticipated. The Conservatives then turned to the DUP, who returned 10 MPs, to form a 'confidence-and-supply' arrangement under which the DUP would provide the necessary votes to pass the Queen's Speech. Such an arrangement was the closest that any Northern Irish party had been to the heart of Westminster for many years.<sup>xiii</sup> Given that the devolved institutions in Northern Ireland at this point were also suspended in the wake of the collapse of Stormont in January 2017, questions were raised over the appropriateness of the British government entering into a deal with one of the Northern Irish parties. Since the Downing Street declaration of 1993, it has generally been understood that the British government should act as an 'honest broker' as far as the continuing peace process is concerned, and not be overly implicated in the party politics of the region. With the DUP and the Conservatives tied in national government, efforts to restart the devolved administration in



Belfast are proving highly difficult; Northern Ireland has since remained in a state of limbo described at the time by then Shadow Secretary of State, Owen Smith, as not direct rule, but ‘in the anti-chamber of direct rule’ (Interview, HC, 04 December 2017).

The deal excited much media attention from the British press, largely with regards to the DUP’s strong social conservatism.<sup>xiv</sup> The issue of the DUP’s influence over social policy returned in late June, when Labour MP Stella Creasy declared she would seek an amendment to the Queen’s Speech that would see NHS England cover the cost of terminations sought by Northern Irish women. This was particularly pressing given that the Supreme Court in London ruled in June that women from Northern Ireland were not legally entitled to have abortions that they underwent outside of the region paid for by the British state. Before Creasy’s amendment could be debated, the Government, aware of the cross-bench support that it had, announced via the Department for Women and Equalities that Northern Irish women will receive NHS funded terminations in England. The letter went on to say that, whilst the Supreme Court judgment made clear that we have the power to make these arrangements:

None of this changes the fundamental position that *this is a devolved issue in Northern Ireland*. It is for the Northern Ireland Executive and the Northern Ireland Assembly to decide on their policy going forward.<sup>xv</sup> (Justine Greening, Minister for Women and Equalities, Open Letter, 29 June 2017)

The Government were thus keen to emphasise that this change in funding did not in any way affect the actual legislative framework in Northern Ireland. The explanation they give here still very much frames abortion as an issue for devolved policymakers, and not something which national government aims to tackle.

Prior to this announcement, the proposed amendment was briefly discussed in the Commons. Creasy framed the proposed change as a way in which political decisions in Northern Ireland had undue influence on health policy and practice in England:

Thousands of women have to travel from Northern Ireland, and *I do not understand why a decision made in Belfast should influence what happens in my hospital in Walthamstow or in other hospitals across this country.* (HC Deb 28 June 2017 vol. 626 c676, emphasis added)

In response, Ian Paisley Jr., DUP MP for North Antrim, said:

I respect the hon. Lady's genuine interest in this subject, but it is important for the House to recognise that *this is not a matter for Belfast; it is a matter for NHS England.* (HC Deb 28 June 2017 vol. 626 c676, emphasis added)

Again, as in 2008, this was framed as an issue for regional discretion, not something for national government. Across both the government's announcement, and the brief debate in the Commons, abortion was discussed as something Stormont holds primacy over. The Conservative Party's coalition deal with the DUP brought an unusual focus to the availability of social rights in Northern Ireland, where the restrictions on abortion and same sex marriage make the Assembly an anomaly amongst the devolved institutions. It was these specific circumstances, not wider party policy that pushed debate at this time.

A similar window for further discussion around Northern Ireland and abortion occurred in May 2018 when the Republic of Ireland voted to repeal the 8<sup>th</sup> amendment to its constitution, thereby allowing access to legal abortion. Northern Ireland's discrepancy around abortion laws was further highlighted by a Supreme Court judgement in early June 2018, which found that Northern Irish abortion laws were incompatible with human rights law. It also ruled, however, that the Northern Irish Human Rights Commission had failed to identify a specific individual in their case who had been harmed by the current law. As a result, the UK government did not have to act to change the law.<sup>xvi</sup> Given that, at this point, the Northern Irish Assembly had been suspended for almost 18 months, it remains unclear who can act on this. Stella Creasy MP tabled an urgent question following this ruling to ask the government how they intended to respond. Again, the government stressed that they did not wish to intervene in Northern

Ireland's legislation, with Secretary of State Karen Bradley stating her "urgent priority is to continue to engage with the parties in Northern Ireland and to re-establish devolved government in Northern Ireland so that decisions can be taken there" (HC, 5 June 2018, col. 453). Across party lines, including several key government figures, Westminster politicians appeared eager to change the law in Northern Ireland. Penny Mordaunt and Heidi Allen, both senior Conservative MPs, spoke in favour of Westminster legislating for the region.

In both 2017 and 2018 therefore, the discussion of abortion and Northern Ireland at Westminster was created through very specific moments of opportunity rather than a considered approach to the formulation and implementation of policy. Furthermore, both instances showed central government unwilling to display any ownership of the issue of abortion in Northern Ireland. The same situation applied when Westminster debates flowed over in the devolved bodies in Wales and Scotland, where the subject of funding terminations on the Welsh and Scottish NHS was discussed by the First Ministers, respectively, in terms not of women's rights, but of 'mak[ing] sure that Wales, England and Scotland offer the same service' (National Assembly for Wales Plenary, 04 July 2014) and as 'a particular issue for NHS Scotland' (The Scottish Parliament, First Minister's Questions, 17 Nov 2016). Without a functioning Assembly and with continuing efforts at Westminster largely being driven by backbenchers, any changes to legislation appear slim.<sup>xvii</sup>

### ***Abortion and Wales***

Unlike Scotland (now) and Northern Ireland, Wales still does not have competence over abortion. This is despite significant changes in its constitutional reach. The National Assembly for Wales (NAfW) established by the Government of Wales Act 1998 (GoWA 1998) was a body corporate conferred with limited executive powers over policy areas that had originally rested with the Welsh Office and Secretary of State for Wales. However, while Schedule 2 of the Act included 'Health and Health Services' in which functions were to be transferred to the

Assembly, it did not clearly specify what secondary powers had been passed to the Secretary of State under the previously existing system of administrative devolution, and thus did not list the executive functions that the NAFW would now have. To identify whether the devolved body had competency over a particular area of policy *within* the remit of ‘Health and Health Services’ required trawling through previous Acts of Parliament (e.g. the National Health Service Act 1977 (Section 28B) conferred powers upon the Secretary of State for Wales to make payments to authorities, bodies and voluntary bodies, ‘if he thinks fit’, towards expenditure on communities services in Wales).

Despite this lack of clarity, it was clear that secondary powers with regards to abortion had *not* been conferred upon the Secretary of State for Wales pre-devolution, and thus were not conferred upon the National Assembly for Wales with GoWA 1998. Unlike the situation in Scotland, therefore, where an explicit decision had been taken to *reserve* powers over abortion, in Wales the decision not to *confer* powers appeared less calculated; if the Secretary of State had previously enjoyed executive powers in an area, it was devolved, if they had not, it was not – and in this policy area, like most others, they had not. The situation was clarified on paper in the *Government of Wales Act 2006*, Schedule 7 of which set out explicitly the legislative competencies devolved to the National Assembly, including within health and health services (Field 9) and included a list of exceptions, which contained: ‘Abortion. Human genetics, human embryology, surrogacy arrangements.’

In 2017, Wales moved to join Scotland and Northern Ireland with a reserved powers model. At this point, the question of whether abortion would be devolved to Wales was hypothetically on the table, as the explanations for why it had *not* been devolved previously no longer applied: (i) Wales’s powers were no longer based upon those previously held by the Secretary of State for Wales pre-devolution; (ii) Wales would now, following the Scotland Act 2016, be the only devolved body to *not* have competency for abortion if the subject was

reserved. However, rather than ape the most recent legislation available in the form of the Scotland Act 2016, the Wales Act 2017 basically copy-pasted the relevant section of the since surpassed Scotland Act 1998.

In Wales, the decision to reserve abortion powers to Westminster was not politically controversial. Indeed, in the discussions preceding the Wales Act 2017 over what powers the Welsh Government should hold, abortion was not raised as an area of controversy. In evidence presented to The Commission on Devolution in Wales (the Silk Commission) in 2013, the Royal College of Surgeons Professional Affairs Board in Wales noted the number of powers related to health currently retained by the UK Government, with abortion amongst them, and stated their belief ‘that these areas should remain the responsibility of the UK Government, who are best placed to address these issues’ (Royal College of Surgeons, 1 March 2013). An oral session before the commission on ‘Health’, featuring evidence from representatives of the Welsh Royal College of Nursing, British Medical Association Welsh Council, and the Royal College of Surgeons Professional Affairs Board in Wales did not see the matter raised (Commission on Devolution in Wales, 3 May 2013). The subject was also not raised in the evidence submitted to the commission by the Conservative Party, Liberal Democrats, Plaid Cymru, or the Communist Party.

The Welsh Government’s position at the time – and thus, the position of the Labour Party – was thus uncontroversial, when, in its own evidence to the commission, it framed the subject as a matter of continuation rather than change. The Welsh Government argued that there should be no reduction in the Assembly’s existing legislative powers, however, ‘the Exceptions to the powers conferred by Schedule 7 [of GoWA 2006] should in substance be expressed in a new Act as matters Reserved to the Westminster Parliament’; and thus:

Health and Health Services should continue to be matters for the Assembly’s legislative competence, save that the Exceptions listed under the Health field in Schedule 7 of GoWA

2006 (for example, Abortion, Human Genetics and related matters, and Xenotransplantation) should generally become matters reserved to the UK Parliament. (Welsh Government, 2013)

The Silk Commission's report resultantly concluded that the evidence they received suggested 'that the majority do not favour changes to the current devolved boundaries on health' (Silk Commission, 2014: 128) and this conclusion remained the consensus thereafter.

Notably, the argument made by nationalists elsewhere that the devolution of abortion was required to tidy up a constitutional anomaly has not been made in Wales, despite the fact that Wales is now 'the anomaly' in this policy area. However, far from an example of the UK Government *denying* equal powers for Wales over abortion, the Welsh have not requested such powers, showing no desire amongst politicians or professionals for parity in this subject area. Asked whether he could recall any arguments within Wales regarding the need to devolve powers over abortion to the Welsh Government, Owen Smith, Labour MP for Pontypridd and the Shadow Secretary of State for Wales between 2012-2015, replied that he had not, explaining this with reference to the shared legal framework that Wales and England share, in comparison to the distinct systems in Scotland and Northern Ireland (HC, 4 December 2017).

Indeed, during the two decades of Welsh devolution, the idea that abortion powers should be devolved to Wales has been raised only once in the National Assembly and the case made for said devolution was founded on a very different logic. In 2012, during Business Statements and Announcements, Plaid Cymru AM Elin Jones, asked for a statement on abortion following reports that the Minister for Health in England at the time had stated they were in favour of reducing the abortion threshold to 12 weeks. Acknowledging media reports that the Assembly Minister for Health was in favour of retaining the current abortion limit of 24 weeks, she subsequently asked for assurances that, if the Minister at Westminster did intend to change the limit, that they would be asked 'to make a statement in the Assembly on the implications of such a change for our national health service and our medical services' and

whether, ‘[i]f there is a move by Westminster to do this, would your Government be in favour of requesting those powers over abortion to come to the Assembly in due course?’ (National Assembly for Wales, 09 October 2012).

In response, Labour’s Jane Hutt, then Minister for Finance and Leader of the House, noted ‘the great concerns’ caused by the messages coming through from the UK Government, framing the issue as an assault on women’s rights across Wales, England and (at the time) Scotland; in Hutt’s words, ‘[t]he UK Government is clearly targeting women, and is taking the clock back in respect of their rights and entitlements.’ Yet, regarding the possibility that powers over abortion be transferred to the Assembly in such an instance, Hutt made clear this notion was not under consideration:

This is not a devolved issue, but our responsibilities are quite clear, and I certainly agree with David Steel on this matter... The legislation that he introduced in 1967 has worked, and I hope that we will abide by it. However, this is not a devolved issue (National Assembly for Wales, 09 October 2012).

What is striking about this exchange is that it represented a nationalist politician arguing for the devolution of abortion powers to Wales *only* if specific actions were carried out at Westminster. In other words, it was not an argument that the sub-state legislature should, as a matter of course, have powers over abortion. The idea that Westminster should have control over abortion was not contested *in itself*, but only if Ministers decided to utilise their powers in a particular manner.

This is a significantly different conceptualisation of what competency over abortion meant, politically, from the 2016 debate over Scotland’s powers; abortion was not a proxy for party positioning on the constitution, nor was seen as linked to defining national values *per se*. Its devolution was requested – purely hypothetically – on the basis of poor public policy, not on the basis of national characteristic or merit. The fact that the Minister so simply dismissed

the notion – ‘this is not a devolved issue’ – further illustrates the lack of political saliency espied in the question of where legislative competency resides.

## **Discussion**

Whilst the Abortion Act has remained relatively untouched since its inception in 1967, the picture for abortion law and policy across the devolved regions of the United Kingdom is far more complex. Further still, as Table 2 illustrates, the justifications within the political debate reveal deeper issues around constitutional preferences, party competition and the institutional framework.

### **[insert Table 2]**

From the above overview, several observations regarding abortion policy and multi-level governance across the UK can be made. First, abortion policy has not been addressed with any coherence. Fully devolved to Scotland; devolved to Northern Ireland but with a substantial English (and now Scottish and Welsh) funding element; reserved for Wales – there is no coherency to abortion policy and law in the contemporary United Kingdom. Within decentralised political systems divergence is of course expected and it is unsurprising that policy variations have emerged as a result of constitutional change; however, questions exist around the legislative coherence as well as the drivers behind these policy changes.

The general oversight regarding abortion can also be seen in the (often very cursory) way it is handled in the debates discussed above. In these debates, there is a distinct lack of ownership of the issue at an institutional level. Westminster has repeatedly insisted that it cannot act for Northern Ireland, even in the context of cross-party support; the Scottish Parliament and Government alike showed little public interest in having abortion devolved until brought up by English (and anti-abortion) MPs; and Wales’s minute engagement has been ad hoc and driven by circumstance. The movements that there have been (the initial 1967 Act;



the 2017 Creasy amendment; devolution to Scotland), have been driven by minor political players and often the result of specific events, rather than considered and coherent policy.

Theories of federalism posit that federal or devolved systems can encourage policy growth through one region emulating another's success – a 'race to the top' (Mackay, 2010). Although there has been some copying between regions in this case (Wales and Scotland following England's decision to provide services for women seeking abortions from Northern Ireland, and Wales and England's decision to reform early medical abortion following Scotland's legal change (Greasley, 2011)), the picture is too confused to suggest any fundamental insight has passed from region to region. Mackay's words on domestic violence policy and Scotland appear equally pertinent to this case: 'For the most part, the story is one of disconnection rather than connections with self contained trajectories in the different jurisdictions – much like that of the wider devolution story' (Ibid). The divergent position we see today across the devolved nations has not been driven by party policy, or a reaction to specific movements on the part of Westminster, or broader social attitudinal changes or divergence across the UK. It is fuelled instead by the ad hoc arrangements which make up the institutional structure of British devolution. In this sense, the generally positive reception that MLG has had for women's issue lobbying does not appear to bear fruit in this context.

Second, from a normative perspective, there is a lack of consideration for women's rights within the debates concerning devolution of abortion law and policy. Abortion is not a major political issue in the UK in the way that it is in the United States (Evans, 2015). Yet, the creeping differentiation across the devolved territories of the UK creates the potential for politicisation. Certainly, Northern Ireland's difference in this regard has seen a starkly different kind of politics compared to the rest of the UK (Thomson, 2015). As Table 2 illustrates, very often these debates on abortion policy have only contained tangential, rather than central, reference to abortion as an issue that is fundamentally concerned with women's rights and

bodily freedom. This article therefore echoes the cautionary warnings of previous work on women and devolution (Kenny and Mackay, 2011; Mackay, 2010). Change in this area may not turn out to be regressive on abortion rights – indeed, since the devolution of abortion Scotland has moved on the potential liberalisations outlined above – but they do also open up opportunities for backsliding on this issue (Amery, 2013; 2015). Such a finding warrants further consideration in future work on abortion law in other systems of multi-level governance, raising the question of how complex governance structures influencing debate and policy in contexts such as Spain, Mexico, Canada or the United States?

### **Conclusion**

The Abortion Act has seen little change since its original enactment and access across the UK (with the exception of Northern Ireland) remains fairly uniform and liberal. However, this hides the very different legislative environment that now exists across the devolved UK. Under the UK's devolved structures it is unsurprising that policy divergence exists. Drivers for debate have been relatively minor, back-bench figures (such as anti-abortion MPs during the debate on Scotland Bill, or Stella Creasy's attempts to change the situation in Northern Ireland) and ad-hoc (2017 Westminster election producing a hung parliament). Changes in policy have thus not been on the basis of a considered approach, but rather impromptu responses to specific political circumstances. This has produced a dis-united picture of abortion policy across the UK. As a consequence, there are now both potentially dangerous implications for women's rights as well as opportunities for devolved regions to enact more liberal legislation, as differing standards of treatment can now be embedded across the legal and political structures.

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**Table 1 - Abortion Law across the devolved nations of the United Kingdom**

	<b>Scotland</b>	<b>Northern Ireland</b>	<b>Wales</b>
Abortion Law post 1998	<p><b>Scotland Act 1998</b> Abortion reserved at Westminster</p> <p><b>Scotland Act 2016</b> Abortion fully devolved</p> <p><b>October 2017</b> Scottish Government altered the administration of second round of tablets for medical abortions – which could be taken at home rather than a clinic</p>	<p><b>Abortion Act 1967</b> never applied to Northern Ireland. Abortion only legal under very strict circumstances, where there is severe risk to the woman's physical or mental health</p> <p><b>Creasy Amendment 2017</b> No change to legislation, but women able to travel to England for terminations – paid for by NHS England</p>	<p><b>Government of Wales Act 1998</b> Abortion not conferred to Wales</p> <p><b>Government of Wales Act 2006</b> Abortion not conferred to Wales</p> <p><b>Wales Act 2017</b> Abortion a reserved power</p> <p><b>June 2018</b> Welsh Government follows changes made in Scotland to administration of early medical abortions.</p>

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**Table 2 – Abortion politics and policy across the devolved nations of the United Kingdom**

	<b>Scotland</b>	<b>Northern Ireland</b>	<b>Wales</b>
<b>Legal situation regarding abortion</b>	Abortion law and policy fully devolved from 2016	1967 Abortion Act has never applied; Northern Irish women seeking abortions elsewhere in the UK receive taxpayer funded treatment	Abortion explicitly a reserved power in Wales Act 2017
<b>Justification for difference given in political debate</b>	Health is fully devolved, therefore abortion should also be devolved; issue also implicated in broader debate around constitutional question and progressive national values	An issue for devolved discretion – both in the sense that Belfast can continue restricted situation, and England, Wales and Scotland can offer funded terminations to Northern Irish women	No request made by government for Wales’ exception to be rectified; no arguments made on the basis of national/constitutional parity
<b>Drivers for debate</b>	Discussion around further powers following the 2014 independence referendum result and Smith commission	Conservative Party minority government post 2017 election – requiring the support of DUP MPs in HoC  Legislative vacuum created by collapse of NI Assembly	Single hypothetical instance of UK government restricted term limits for abortion

<sup>i</sup> In 1990 the term limit for a legal abortion was decreased from 28 weeks to 24 weeks.

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<sup>ii</sup> For a woman travelling from Northern Ireland, until the 2017 Westminster ruling, a termination could cost anywhere between a few hundred to a few thousand pounds, depending on how advanced the pregnancy was.

<sup>iii</sup> Classified as a substance that induces abortion

<sup>iv</sup> <https://www.bbc.co.uk/news/uk-politics-45955492>. Accessed 18/01/19.

<sup>v</sup> Interview with anonymous member of the Committee

<sup>vi</sup> See <https://www.engender.org.uk/content/publications/Joint-statement-on-Scotland-Bill---NC56---Abortion.pdf>

<sup>vii</sup> See <http://www.whatscotlandthinks.org/questions/should-scottish-government-or-uk-government-make-the-key-decisions-for-scotland-2>

<sup>ix</sup> Abortion Rights UK described the decision as “a progressive move and one which is in line with modern medicine”, see <http://www.abortionrights.org.uk/ar-press-release-home-administration-of-abortion-pills>.

<sup>x</sup> For example, the Society for the Protection of Unborn Children described the move as “unlawful” and sought to block the move by seeking judicial review.

<sup>xi</sup> This section expands upon Thomson, 2019, 102-103.

<sup>xii</sup> Although the UK’s responsibility under international treaties such as the Convention on All Forms of Discrimination Against Women, still encourage central government action on the issue (Thomson, 2016).

<sup>xiii</sup> Prior to this, the Ulster Unionist Party had an alliance with the Conservative party going into 2010 General Election.

<sup>xiv</sup> In particular, the views of the DUP post the 2017 general election (See Tonge, et al. 2014).

<sup>xv</sup> Emphasis added

<sup>xvi</sup> However, a specific individual, Sarah Ewart, took a case to the Belfast High Court in early 2019.

<sup>xvii</sup> The leaked Labour manifesto (2017) stated the party would legislate to extend the right to Northern Ireland for women to choose a safe, legal abortion. The final version of Labour’s manifesto altered this section to state the party would work with the Assembly to extend this right. The change in focus from the original version suggests a sense of confusion over potential influence on this policy but eventual acknowledgement for the multi level structures.